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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL JARAMILLO, Defendant and Appellant.	B215844 (Los Angeles County Super. Ct. No. BA337322)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Miguel Jaramillo, appeals from his convictions for second degree robbery (Pen. Code,[1] § 211), attempted kidnapping to commit robbery (§§ 209, subd. (b)(1), 664), attempted second degree robbery (§§ 211, 664), kidnapping to commit robbery (§ 209, subd. (b)(1)), and robbery (§ 211.) Defendant argues the trial court improperly instructed the jury with CALCRIM No. 460. We affirm the judgment.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) At approximately 2 a.m. on May 10, 2006, Romeo Ocampo was walking in the area of Beverly Boulevard and Alexandria Street. A truck drove into the driveway of a restaurant cutting Mr. Ocampo off. Three Hispanic men got out of the passenger area of the truck. One of the men pushed Mr. Ocampo toward two of the men while another hit him in the head. Two of the men took Mr. Ocampo's wallet. One of the four men told him, "You look at me, I'll to kill you." Mr. Ocampo had an automated teller card, a driver's license, social security card and approximately $35 in cash in his wallet. The men sent Mr. Ocampo away warning him, "Don't look." After the robbery, the bank informed Mr. Ocampo of charges made on his automated teller card at Vons market and a Union 76 gas station, which he had not authorized. Mr. Ocampo later identified defendant's brother, Jesse Cruz, and Robert Delgado as two of the three individuals that robbed him from photographic lineups shown to him by the police.

A surveillance videotape from a Vons store located approximately three-quarters of a mile from where Mr. Ocampo was robbed was obtained by the police. The video, which was taken at approximately 2:15 a.m. on May 10, 2006, depicted someone who resembled defendant. Three other individuals appeared to be Mr. Cruz, Mr. Delgado and defendant's sister, Sochil Cruz. The video was played for the jurors at trial. When defendant was interviewed by the police, he stated that he and others went to the Vons store where his sister, Ms. Cruz, purchased diapers.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

At approximately 8:15 p.m. on May 14, 2006, Francisco Marroquin was walking home from church. Mr. Marroquin had a bible in his pocket upon which was enscribed "Santa Biblia." Mr. Marroquin saw a truck driven by a woman stop nearby. Two Hispanic men got out of the truck. Each man pointed a gun at Mr. Marroquin. One of the men also had a device from which he fired an electrical discharge. The same man told Mr. Marroquin to get inside the truck. When Mr. Marroquin refused, the man told him he would shoot at him. The man attempted to shoot Mr. Marroquin with the electrical instrument, but his leather jacket prevented him from being shocked. The men then pushed Mr. Marroquin into the truck, forced him to lie down on the floor of the back seat, and told him not to resist. The men then asked Mr. Marroquin for his belongings, including his money, wallet, watch, and social security card.

Mr. Marroquin was then driven to a bank. The men asked Mr. Marroquin for his personal identification number. The men then withdrew money by using Mr. Marroquin's bank card, which was in his wallet. Mr. Marroquin remained in the truck when the three individuals drove to a party. Mr. Marroquin was blindfolded. The two men got out of the truck. When the two men returned to the truck, they each had a beer. The men had pointed their guns at Mr. Marroquin during the time he was inside the truck. Mr. Marroquin was dropped off a few blocks from where he had been abducted. The men told Mr. Marroquin not to call the police or they would kill his family. Mr. Marroquin's address was on his California identification card. Mr. Marroquin did not initially call the police because he was afraid. However, the police later contacted Mr. Marroquin at his home. Mr. Marroquin identified defendant at trial as one of the individuals who forced him into the truck and took his property.

At approximately 11:00 or 11:30 p.m. on May 14, 2006, Sharony Guzman was walking home from the bus after work in the area of Beverly Boulevard and Westmoreland Avenue. As Ms. Guzman passed a black truck with tinted windows, the doors suddenly unlocked. Two young Hispanic men got out of the car. Both men had guns. At the preliminary hearing and trial, Ms. Guzman identified defendant one of the individuals. Defendant held a gun and a taser gun. As one of the men approached Ms.

Guzman with a gun, she began stepping back. The man told Ms. Guzman to get into the car unless she wanted to die. Ms. Guzman said she would not get into the car. The men responded: "Just get in the car, bitch. Get in the fucking car."

Ms. Guzman again refused to enter the car and told the men she was going to start yelling for help. One of the men grabbed Ms. Guzman's wrist and attempted to put her into the truck. Defendant was flickering his taser gun in a threatening way. Ms. Guzman pulled away and ran into the street. The man who had grabbed her yelled, "Michael, can you help me grab her?" As Ms. Guzman ran, she saw the men laughing and pointing their guns at her as though they were going to shoot her.

On May 19, 2006, Los Angeles Police Officer Osvaldo Delgadillo stopped a dark-colored Yukon truck with tinted windows, which bore no license plates. Officer Delgadillo saw the rear passenger making furtive moves. Officer Delgadillo told the occupants to remain seated and keep their hands visible. Mr. Delgado was driving. Ms. Cruz was in the front passenger seat. Two other individuals were in the rear passenger area. The car was determined to belong to Ms. Cruz.

A search of the Yukon truck revealed: a .22 caliber handgun; two replica semiautomatic handguns; numerous cell phones; batteries; an iPod; money; a bible labeled "Santa Biblia"; and various identification cards, including one belonging to Mr. Marroquin; Mr. Ocampo's driver's license, social security card, Medicare card, and Kaiser Permanente card . A search of Ms. Cruz's apartment revealed a taser gun. A search of defendant's person at that time revealed currency from Mexico, Colombia, and South Korea.

Following his arrest on May 19, 2006, defendant was interviewed by Detectives Michael Arteaga and Gilbert Alonso. After being advised of his rights, defendant agreed to speak with the detectives without an attorney being present. Defendant admitted that he had been in his sister's car when other men, who were strangers to him, were "mugging people." Defendant indicated the men took the victims' credit cards. Defendant stated he then went to the Vons market with Ms. Cruz, Mr. Cruz, and Mr. Delgado to buy diapers for Ms. Cruz's children. Defendant also admitted he was with

Mr. Cruz when he got out of the car, used a taser on a victim and ordered him into the car. Defendant stated he was just present but did not participate. Defendant acknowledged that he was present when Mr. Cruz approached a young woman and ordered her to get into the car. Ms. Cruz had pointed out Ms. Guzman while driving around, indicating "She probably has a credit card." During that incident, defendant heard Mr. Cruz say, "Help me, Michael."

Defendant's sole contention on appeal is that the trial court improperly instructed the jury with CALCRIM No. 460[2] as to count 3, the attempted aggravated kidnapping to

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[2] The trial court first instructed the jury regarding robbery, its requisite element of intent, and the liability of an aider and abettor to robbery. The trial court then instructed the jurors regarding aggravated and simple kidnapping: "Kidnapping is charged in count - - we'll talk about kidnapping for the purpose of robbery. The defendant is charged in count 7 with kidnapping for the purpose of robbery. This is called aggravated kidnapping. [¶] To prove that the defendant is guilty of this crime, the People must prove that: number one, the defendant intended to commit robbery; number two, acting with that intent, the defendant took, held or detained another person by using force or by instilling a reasonable fear; number three, using that force or fear, the defendant moved the person a substantial distance; number four, the other person was moved or made to move a distance beyond that merely incidental to a commission of a robbery; five, when that movement began, the defendant already intended to commit robbery; number six, the other person did not consent to the movement. [¶] To be guilty of kidnapping for the purpose of robbery, the defendant does not actually have to commit the robbery. To decide whether the defendant intended to commit robbery, please refer to the separate instruction that I have given you on that crime. [¶] Now, simple kidnapping is a lesser offense of aggravated kidnapping. To prove the defendant is guilty of this crime, the People must prove that: number one, the defendant took, held or detained another person by using force or [by] instilling reasonable fear; number two, using that force or fear, the defendant moved the other person or made the other person move a substantial distance; and number three, the other person did not consent to the movement." Thereafter, CALCRIM No. 460 was given as follows: "The defendant is charged in count 3 with attempted kidnapping and in count 4 with attempted robbery. To prove that the defendant is guilty of these crimes, the People must prove that: The defendant took a direct but ineffective step toward committing kidnapping and or robbery; number two, the defendant intended to commit kidnapping and or robbery. [¶] A direct step requires more than merely planning or preparing to commit robbery or kidnapping or obtaining or arranging for something needed to commit robbery or kidnapping. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit

commit robbery against Ms. Guzman. Defendant argues that the trial court instructed the jury that defendant was charged with the attempted simple kidnapping of Ms. Guzman rather than attempted aggravated kidnapping for robbery. Defendant concludes that the error requires reversal because the instruction removed an element of the crime.

When the trial court discussed jury instructions with counsel, defense counsel specifically requested that the jurors be instructed with simple kidnapping as to Ms. Guzman: "Attempted simple kidnapping because, as the court well knows, the testimony establishes that she had her purse. He didn't grab her purse, take the purse or try to take the purse." The trial court again discussed this instruction with counsel, "So you'd like an option of the jury to read, your client could be found guilty of attempted simple kidnapping?" The trial court continued, "Would you agree that if they find guilt on count 4, which is attempted robbery, then – " Defense counsel responded that although that was a fair argument, the fact that Ms. Guzman's purse was not taken suggests it was not an attempted robbery.

In his closing argument, trial counsel argued that although Ms. Guzman had a purse, no one tried to take her purse. As a result, defense counsel reasoned that if defendant and his brother had wanted to rob Ms. Guzman all that was necessary was to take her purse. Since that did not happen, no attempted robbery occurred. "What happened in this case is they tried to get her in the car. And what's that? Attempted kidnapping, not attempted kidnapping for purposes of robbery. Simply attempted kidnapping."

The prosecutor rebutted that argument: "[Defense counsel] has asked [you to] look at each incident in a vacuum, and that goes against common sense. He's saying you

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robbery or kidnapping. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt. [¶] To decide whether the defendant intended to commit robbery or commit kidnapping, please refer to the separate instructions I have given you that describe those crimes."

can't find that [Ms.] Guzman - - you know, that [defendant] intended to actually kidnap her and rob her because, if you just look at that incident, there's nothing else to show his intent. [¶] . . . [¶] Right after Mr. Marroquin was dropped off, I would say within a period of couple of hours, [Ms.] Guzman. . . . Within that short time frame, the defendant and his brother and sister are committing the same exact act. They are carrying out their enterprise to kidnap people and to rob them. [¶] Now, [defense counsel] said just because they don't go for [Ms.] Guzman's purse, that is proof they had no intent to rob her. No. They were following a pattern. What they did was grab Mr. Marroquin previously. He had money. He had a wallet. He had personal effects. He had a wallet. They waited. They forced him into the car. After he was forced into the car, that is where they took all his possessions. That was the same exact method for Ms. Guzman. They were about to force her into the car so that they can take her items. In fact, [defendant], stated in the interview that his sister at one point picked out Ms. Guzman and said she probably has a credit card."

In its closing instructions, the trial court explained the differences between greater and lesser crimes: "As I mentioned before, count 3 charges attempted kidnapping with the intent to commit robbery. This is known as aggravated kidnapping. Simple kidnapping is a lesser crime of aggravated kidnapping. It is up to you to decide the order in which you consider each crime and the relevant evidence. But I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime."

A defendant may be found guilty of aggravated kidnapping if the evidence demonstrates that they intended to commit a robbery when they held or detained the victim. "All that is required is that the defendant have the specific intent to commit a robbery at the time the kidnapping begins." (*People v. Davis* (2005) 36 Cal.4th 510, 565-566; *People v. Curry* (2007) 158 Cal.App.4th 766, 779.) The instructions for aggravated kidnapping must necessarily include the requisite intent element. We review the instructions as a whole to determine whether it is reasonably likely that the jury misconstrued the instructions given. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013;

People v. Roybal (1998) 19 Cal.4th 481, 526-527; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1134; *People v. Frye* (1998) 18 Cal.4th 894, 957, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248, *People v. Castillo* (1997) 16 Cal.4th 1009, 1014-1016.) In *People v. Frye, supra,* 18 Cal.4th at p. 957, the California Supreme Court held: "In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."'" (*People v. Frye, supra,* 18 Cal.4th at p. 957, quoting, *Boyde v. California* (1990) 494 U.S. 370, 378; see also *People v. Burgener* (1986) 41 Cal.3d 505, 538, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753.)

Here, as set forth in footnote 2, the trial court instructed the jurors on: robbery and the related intent of both the perpetrator and aider and abettor; simple kidnapping; and attempted kidnapping to commit robbery. The trial court further instructed the jurors that they must refer to the specific instructions given as to each crime in deciding whether defendant intended to commit robbery or kidnapping. The California Supreme Court has consistently stated that on appeal: "'"Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."' [Citation.]" (*People v. Carey* (2007) 41 Cal.4th 109, 130, quoting *People v. Lewis* (2001) 26 Cal.4th 334, 390; *People v. Yeoman* (2003) 31 Cal.4th 93, 139; *People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.)

Moreover, the instruction as to count 7, the kidnapping for robbery offense against Mr. Marroquin specifically noted the jurors must find defendant intended to rob Mr. Marroquin for the kidnapping to be aggravated. The guilty verdict form as to count 7 demonstrated the jurors understood the necessary intent element for aggravated kidnapping. The arguments of counsel clearly identified the intent to commit robbery was an element of the aggravated kidnapping attempt. In addition, the trial court distinguished the differences between simple and aggravated kidnapping as to count 3

following closing arguments: "[C]ount 3 charges attempted kidnapping with the intent to commit robbery. This is known as aggravated kidnapping."

Furthermore, the Information charged defendant in count 3 with "the crime of attempted kidnapping to commit another crime, in violation of Penal Code section 664/209(b)(1), a Felony, was committed by, [defendant], who did unlawfully attempted [sic] to kidnap and carry away Sharony Guzman to commit Robbery." The verdict form for count 3 stated: "We, the jury in the above entitled action, find the defendant, [] guilty of the crime of attempted kidnapping to commit robbery, of Sharony Guzman . . . ." Moreover, the jurors specifically found defendant guilty of attempted robbery in count 4 as to the crimes against Ms. Guzman. The jury had been instructed that such a finding required a specific intent to commit robbery. The jurors therefore necessarily found the intent to commit robbery as it related to the attempted kidnapping as well. Finally, defendant's statement to police included his sister's reference to the likelihood that Ms. Guzman had a credit card, which was consistent with an intent to rob Ms. Guzman.

In light of other instructions given, the arguments of counsel, the jurors' findings as to count 4, and the overwhelming proof of guilt, any instructional error was harmless beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 257-258 [erroneous special-circumstance instruction harmless beyond a reasonable doubt]; *People v. Ervin* (2000) 22 Cal.4th 48, 91; see also *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1994) 30 Cal.App.4th 1758, 1763.)

The judgment is affirmed.

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WEISMAN, J.*

We concur:

ARMSTRONG, ACTING P.J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.